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IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Martha F. Davis*
Julie Goldscheid
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street, 5th floor
New York, New York 10014
(212) 925-6635

Eileen N. Wagner
4906 Fitzhugh Avenue
Suite 201
Richmond, Virginia 23230
(804) 359-1169

Carter G. Phillips
Richard D. Bernstein
Katherine Adams
Faith E. Gay
Paul A. Hemmersbaugh
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

*** *Counsel of Record***

June 30, 1999

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QUESTIONS PRESENTED

I. Whether Congress acted within the scope of its Commerce Clause authority when it enacted 42 U.S.C. § 13981 (the "VAWA civil remedy"), the provision of the Violence Against Women Act that creates a private right of action for victims of gender-motivated violence, based on extensively documented findings that discriminatory violence creates significant barriers to participation by women in interstate commerce?

II. Whether Congress' enactment of the VAWA civil remedy (42 U.S.C. § 13981) was a permissible exercise of its authority under Section 5 of the Fourteenth Amendment?

LIST OF PARTIES

The parties to the proceedings in the Court whose judgment is sought to be reviewed here are those who appear in the caption of the case. The United States of America intervened in the district court to defend the constitutionality of 42 U.S.C. § 13981. Additional parties to the proceedings as respondents include James Landale Crawford, Virginia Polytechnic Institute and State University, Cornell D. Brown, and William E. Landsidle.

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OPINIONS BELOW

The opinions of the court of appeals are reported at 169 F.3d 820 (4th Cir. 1999) (*en banc*) and 132 F.3d 949 (4th Cir. 1997), and are reproduced in the Appendix accompanying the Petition of the United States in this case ("App.") at 1a and at 282a. The opinion of the district court is reported at 935 F. Supp. 779 (W.D. Va. 1996) and is reproduced at 350a.

STATEMENT OF JURISDICTION

The first decision of the United States Court of Appeals for the Fourth Circuit was entered on December 23, 1997, and was vacated on February 5, 1998. The *en banc* court of appeals

decision was entered March 5, 1999. The Court extended the time for filing this Petition until June 30, 1999. The United States intervened in the proceedings below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . to regulate Commerce among the several States."

The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The civil provision of the Violence Against Women Act, 42 U.S.C. § 13981, is reproduced in the Appendix at 404a-406a.

STATEMENT OF THE CASE

I. Factual Background

Christy Brzonkala brought this case against respondents Antonio Morrison and James Crawford, who she alleges repeatedly and forcibly gang raped her in September 1994, just after she enrolled as a student at Virginia Polytechnic Institute ("Virginia Tech"). After raping Brzonkala, Morrison warned her, "you better not have any f*****g diseases." In the months following the rape, Morrison announced publicly in the

dormitory's dining room that he "like[d] to get girls drunk and f**k the s**t out of them." After Brzonkala filed a complaint under Virginia Tech's sexual assault policy, she learned that another male student athlete had been overheard advising Crawford that he should have "killed the b***h."

As a result of the gang rape, Brzonkala stopped attending classes and eventually dropped out of college. Virginia Tech first conducted a disciplinary proceeding after which it found Morrison guilty of sexual assault, but then conducted a second, superseding disciplinary proceeding after which it found that he had violated the school's Abusive Conduct Policy. The school then reversed those conclusions and instead imposed "deferred suspension until [Morrison's] graduation from Virginia Tech" and required Morrison "to attend a one-hour educational session with an EO/AA Compliance Officer." Upon learning from a newspaper that the university had set aside Morrison's suspension and continued his full athletic scholarship, Brzonkala canceled her plans to return to school.

II. Statutory Background

Congress enacted the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.) ("VAWA"), upon finding that gender-based violence was sufficiently widespread and unchecked that it substantially affected commerce among the states. VAWA contains a civil remedy, 42 U.S.C. § 13981 (the "VAWA civil remedy"), granting a victim of gender-motivated violence a cause of action against

the perpetrator of the discriminatory violence.[1] Beginning in 1990 and continuing until 1994, Congress held multiple hearings, compiled committee and conference reports and actively debated the proposed bill's provisions. See generally Victoria Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 Wis. Women's L.J. 1 (1996) (recounting legislative history). Through that process, Congress learned precisely how gender-based violence has created formidable barriers to women's full participation in commerce and of the states' inadequate and discriminatory response.

Before enacting the law, Congress reviewed a stark legislative record of women's disproportionate risk of being subjected to gender-based violence and of the economic consequences of that violence. For example, Congress learned that women were forced to give up job opportunities in locations and during hours when the risk or fear of violence is increased, particularly in higher-paying night jobs and in service and retail industries. See, *e.g.*, S. Rep. No. 103-138, at 54 n.70 (1993) ("1993 S. Rep.").[2] It also learned that homicide is the leading cause of women's deaths at work. See, *e.g.*, *id.* at 54

[1] The VAWA civil remedy creates a private cause of action for victims of gender-motivated violence who can establish that the crime of violence was sufficiently severe to rise to the level of a felony and that it was gender-motivated. *See* 42 U.S.C. § 13981. Like other civil rights laws, the VAWA civil remedy allows victims of discriminatory violence to recover for the resulting economic damages such as lost wages, medical expenses, and housing costs.

[2] *See also Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 86 (1991) (statement of Burt Neuborne, Professor of Law, New York University); *Women and Violence: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 69 (1990) ("*1990 S. Hearing*") (statement of Helen Neuborne and Sally Goldfarb).

n.70 (reporting that homicide causes 42 percent of women's deaths and only 12 percent of men's). Congress reviewed evidence that women frequently leave their jobs or are fired as a result of gender-motivated violence. *Id.*

Additional evidence revealed that gender-based violence leads to poverty and increased reliance on government benefits and social services, as reflected, for example, by the 50 percent of homeless women who have fled violence in their homes. See, *e.g.*, S. Rep. No. 101-545, at 37 (1990) ("1990 S. Rep."). In addition, Congress learned that women often are forced to travel interstate in search of havens from batterers. See 1993 S. Rep. at 54.[3]

Congress also received evidence of the states' failure to remove barriers to commerce created by longstanding discriminatory responses to gender-based violence. For example, in some states, formal legal barriers such as interspousal immunities for rape prosecutions and tort actions preclude criminal prosecution and civil redress. See, *e.g.*, 1993 S. Rep. at 42; S. Rep. No. 102-197, at 45, 54 (1991) ("1991 S. Rep."); 1990 S. Rep. at 41 n.78.[4] Beyond formal barriers,

[3] *See also Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. 15 (1994) (statement of Karla Digirolamo); *Violence Against Women: Fighting the Fear: Hearing on S.11 Before the Senate Comm. on the Judiciary*, 103d Cong. 33 (1993) (testimony of Barbara Michaud); Brief *Amici Curiae for 66 Organizations Serving Domestic Violence Survivors in Support of Respondents, Saenz* v. *Roe*, 119 S. Ct. 1518 (1999) (No. 98-97), *aff'g Roe* v. *Anderson*, 134 F.3d 1400 (9th Cir. 1998) (detailing battered women's flight across state lines to secure safety from their batterers).

[4] *See also, e.g., Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 8-9 (1993) ("*1993 H. Hearing*"); *1990 S.*

gender-bias task forces documented that crimes disproportionately affecting women are treated less seriously by state actors than comparable crimes affecting men. See, *e.g.*, 1993 S. Rep. at 49 (citations omitted). Congress found that police, prosecutors, juries and judges in state justice systems routinely subject female victims of rape, sexual assault, and domestic violence to degrading and discriminatory treatment, which contributes to the low rates of reporting and conviction that characterize these crimes. See, *e.g.*, 1991 S. Rep. at 39, 44.[5]

Rather than intruding into an area of traditional state concern, Congress heard evidence that the proposed federal law would assist the states by providing a supplemental civil remedy.[6] Forty-one Attorneys Generals from 38 states urged

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Hearing at 59, 64.

[5] *See also, e.g., Majority Staff of Senate Comm. on the Judiciary, 103rd Cong., Response to Rape: Detours on the Road to Equal Justice* 2-6 (Comm. Print 1993); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 75 (1992) ("*1992 H. Hearing*") (statement of Margaret Rosenbaum, Assistant State Attorney and Division Chief, Domestic Crimes Unit, Miami, Florida) (recognizing that police officers persist in failing to treat domestic violence as a "real crime"); *Report On District of Columbia Police Response To Domestic Violence* (1990), *reprinted in 1992 H. Hearing* at 101; *1990 S. Hearing* at 29-30 (testimony of Marla Hanson).

[6] VAWA also contained narrow criminal remedies. *See* 18 U.S.C. §§ 2261, 2262 (criminalizing interstate domestic violence and interstate violation of protective orders). Those provisions have uniformly been upheld as constitutional enactments under Congress' Commerce Clause authority. *See, e.g., United States* v. *Gluzman*, 154 F.3d 49 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1257 (1999); *United States* v. *Wright*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998); *United States* v. *Bailey*, 112 F.3d 758 (4th Cir.), *cert. denied*, 118 S. Ct. 240 (1997); *see also United States* v. *Page*, 167 F.3d 325, 335 (6th Cir. 1999) (*en banc*) (per curiam) (agreeing that

Congress to enact the legislation, including the civil remedy, because:

> the current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership and federal funds. [VAWA] would begin to meet those needs by, *inter alia*, . . . creating a specific federal civil rights remedy for the victims of gender-based crimes . . . .[7]

During the four-year period of legislative review, Congress debated and redrafted the VAWA civil remedy.[8] It ultimately enacted a narrow and targeted law that complements other federal anti-discrimination statutes providing redress for discriminatory violence.

III. Procedural Background

On December 27, 1995, Brzonkala filed suit against Morrison, Crawford and Virginia Tech. Her amended complaint, filed March 1, 1996, alleged, in pertinent part, that Morrison and Crawford brutally gang-raped her in violation of the VAWA civil remedy.

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criminal provision was constitutional exercise of Commerce Clause authority (Moore, J., concurring)).

[7] *See 1993 H. Hearing* at 34-36 (Letter from Attorneys General).

[8] For example, Congress precluded removal to federal court if a plaintiff filed in state court and prohibited supplemental jurisdiction over divorce or other marital property or child custody matters. *See* 28 U.S.C. § 1445(d); 42 U.S.C. § 13981(e)(4). To date, the law has been the subject of fewer than 35 reported decisions.

On March 4, 1996, and April 3, 1996, defendants Morrison and Crawford moved to dismiss Brzonkala's civil VAWA claims on the bases that Brzonkala had not stated a claim and that VAWA's civil remedy was unconstitutional. The United States intervened as of right to defend the law's constitutionality. On July 26, 1996, the district court held that Brzonkala's complaint stated a VAWA civil claim, but struck down the law as unconstitutional. App. at 402a. The district court held that Congress lacked authority to enact the law under either the Commerce Clause or Section 5 of the Fourteenth Amendment. Although the court conceded that violence against women has a major effect on the national economy, and that violence against women has a greater impact on the national economy than does gun possession near schools, the court held that the VAWA civil remedy was beyond Congress' Commerce Clause power because the regulated activity was "too remote from interstate commerce." *Id.* at 376a. The court also rejected Section 5 as a basis for the law, reasoning that "remedying private individuals' gender-based crimes" was not a legitimate goal of Section 5 legislation and that the law was not a reasonable response directed to address deficiencies in state law enforcement. *Id.* at 398a.

On December 23, 1997, a panel of the Fourth Circuit reversed, holding that Brzonkala's complaint stated claims under both Title IX and the VAWA civil remedy and that Congress constitutionally exercised its Commerce Clause powers when it enacted the law. The court concluded that the law was a rational response to the legislative record, which documented the myriad ways gender-based violence interferes with women's full participation in interstate commerce and otherwise affects interstate movement and activities by women. *Id.* at 310a. The majority declined to address Section 5. Judge Luttig dissented, relying primarily on the trial court's reasoning. *Id.* at 340a. The panel opinion was vacated and rehearing

en banc was granted on February 5, 1998.

On March 5, 1999, the *en banc* court, in a 7-4 decision, held that Brzonkala stated a VAWA civil claim but that the law was unconstitutional under both the Commerce Clause and Section 5. *Id.* at 6a.[9] The dissenting judges would have upheld the law under the Commerce Clause and therefore did not address Section 5. *Id.* at 224a n.1.

REASONS FOR GRANTING THE WRIT

Review should be granted because this case presents extraordinarily important questions of constitutional law and serious conflicts in the lower court interpretations of important prior decisions of this Court. *First*, *certiorari* should be granted "to review the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). See *infra* at 11-12.

Second, the decision below creates three fundamental conflicts with *United States* v. *Lopez*, 514 U.S. 549 (1995), and the decisions of other courts of appeals interpreting *Lopez*. These conflicts are presented by the Fourth Circuit's (1) bright-line rule that intrastate noneconomic activity is beyond the scope of the commerce power regardless of that activity's practical, real-world effects on interstate commerce and the national economy; (2) resurrection of a formalistic distinction between direct and indirect effects on commerce that has been squarely rejected since *NLRB* v. *Jones & Laughlin Steel Corp.*,

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[9] Brzonkala also had brought a Title IX claim against Virginia Tech, which was dismissed by the district court but subsequently upheld by the panel. The *en banc* court remanded the Title IX claim for reconsideration by the district court following this Court's ruling in *Davis* v. *Monroe County Board of Education*, 119 S. Ct. 1661, 1676 (1999).

301 U.S. 1, 38 (1937); and (3) its unprecedently sweeping holding that the entire fields of criminal law and tort law should be treated as areas of exclusively state concern in commerce power analysis. See *infra* at 13-17.

Third, review will allow this Court to define when courts must exercise "great restraint" and give "deference" to Congress in commerce power analysis. *Lopez*, 514 U.S. at 568, 573 (Kennedy, J., concurring). The distinctions between this case and *Lopez* will enable this Court to enunciate reasonable and principled limitations on Congress's commerce power over intrastate activities, while confirming Congress' important authority to remedy real impediments to the national economy and interstate commerce that the states have not removed. The vital distinctions between this case and *Lopez* that provide limitations on the commerce power are: (1) here Congress made extensive and reasonable findings in support of the exercise of its delegated power; (2) the VAWA civil remedy is not a criminal statute and addresses an area of traditional state bias and neglect -- discriminatory violence against women; and (3) because the VAWA civil remedy is anti-discrimination legislation that seeks to remove documented and persistent intrastate barriers to the participation of specific groups in interstate commerce and the national economy, it falls within the commerce power as interpreted by this Court in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53, 257, 260-61 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294, 300, 302, 304 (1964). See *infra* at 18-26.

Fourth, the decision below conflicts with the interpretation of Section 5 of the Fourteenth Amendment ("Section 5") set forth in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and decisions of other courts of appeals interpreting *Boerne*. See *infra* at 26-28.

I. THE INVALIDATION OF A FEDERAL STATUTE BY THE FOURTH CIRCUIT WARRANTS REVIEW BY THIS COURT.

When a federal court of appeals holds a federal statute unconstitutional, the profound interplay between separation of powers and judicial restraint raises "an important question of federal law" that makes the argument for *certiorari* compelling. Sup. Ct. R. 10(c). See, *e.g.*, *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (*certiorari* granted "to review the exercise of the grave power of annulling an Act of Congress"); see also Robert L. Stern et al., *Supreme Court Practice* § 4.12, at 185 (7th ed. 1993) (recognizing "obvious importance of the case" when court of appeals invalidates federal statute).[10]

In 1994, after holding extensive hearings and making legislative findings, Congress reached a considered judgment that the VAWA civil remedy falls within the permissible scope of the Commerce Clause power, as well as its power under Section 5 of the Fourteenth Amendment. See 42 U.S.C. § 13981(a). Due respect for the considered judgment of a coordinate branch of government warrants review of the judicial decision invalidating the VAWA civil remedy. Delay deprives petitioner and all other women in the five states covered by the Fourth Circuit of a remedy Congress believed was both necessary and proper.

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[10] Indeed, in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which *United States* v. *Lopez* described as "the watershed case" on Commerce Clause powers, 514 U.S. 549, 555 (1995), the Court granted *certiorari* and reversed even though there was no conflict in the courts of appeals. *See* 301 U.S. at 22; Pet. for Cert. at 10-14, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (No. 419) (filed Sept. 1936).

The issues raised by the holding below will neither be further developed nor resolved by delay. The legal issues have already been thoroughly explored in a series of lower court decisions. Moreover, the decision below stands virtually alone in invalidating this statute. Other than this case, fourteen of the fifteen district courts to address the question, both before and after the Fourth Circuit's *en banc* decision, have upheld the VAWA civil remedy.[11] The conflict between the decision in this case and these numerous district court decisions upholding this federal statute's constitutionality further supports granting *certiorari*. See, *e.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 114 (1942) (granting *certiorari* and reversing where circuit court decision invalidating statute as exceeding Commerce Clause power was in conflict only with district court decisions); see also Stern et al., *supra* § 4.8, at 178-79 (noting other cases where conflict with district court decisions was factor favoring *certiorari*).

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[11] *See, e.g.*, *Wright* v. *Wright*, No. Civ-98-572-A (W.D. Okla. Apr. 27, 1999); *Ericson* v. *Syracuse Univ.*, No. 98 Civ. 3435, 1999 WL 212684, at *3-*4 (S.D.N.Y. Apr. 13, 1999); *Culberson* v. *Doan*, No. C-1-97-965 (S.D. Ohio Apr. 8, 1999); *Doe* v. *Mercer*, 37 F. Supp. 2d 64, 68 (D. Mass. 1999); *Liu* v. *Striuli*, 36 F. Supp. 2d 452, 476 (D.R.I. 1999); *Ziegler* v. *Ziegler*, 28 F. Supp. 2d 601, 613 (E.D. Wash. 1998); *C.R.K.* v. *Martin*, No. 96-1481 (D. Kan. July 10, 1998); *Timm* v. *DeLong*, No. 8:98CV43 (D. Neb. June 22, 1998); *Mattison* v. *Click Corp. of America, Inc.*, Civ. A. No. 97-CV-2736, 1998 WL 32597, at *6 (E.D. Pa. Jan. 27, 1998); *Crisonino* v. *New York City Hous. Auth.*, 985 F. Supp. 385, 397 (S.D.N.Y. 1997); *Anisimov* v. *Lake*, 982 F. Supp. 531, 540 (N.D. Ill. 1997); *Seaton* v. *Seaton*, 971 F. Supp. 1188, 1193-95 (E.D. Tenn. 1997); *Doe* v. *Hartz*, 970 F. Supp. 1375, 1434 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F. 3d 1339 (8th Cir. 1998); *Doe* v. *Doe*, 929 F. Supp. 608, 613 (D. Conn. 1996). *But see Bergeron* v. *Bergeron*, No. Civ. A. 96-3445-A, 1999 WL 355954, at *7-*8 (M.D. La. May 28, 1999).

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICTS IN THE CIRCUITS CONCERNING THE PROPER INTERPRETATION AND APPLICATION OF *UNITED STATES* V. *LOPEZ*.

In *United States* v. *Lopez*, 514 U.S. 549 (1995), the Court considered the Gun Free School Zones Act (GFSZA), 18 U.S.C. § 922(q) (amended 1994, 1996), which made it a federal crime to possess a firearm in the vicinity of a school. *Lopez* is an important case, and has generated literally dozens of decisions in the courts of appeals interpreting and applying it. See *Terry* v. *Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996) ("*Lopez*'s impact on the limits of the commerce power is a hotly debated issue."), *cert. denied*, 520 U.S. 1264 (1997). It is customary for this Court to grant review to resolve conflicts in the courts of appeals concerning the interpretation and application of an important decision of this Court. See, *e.g.*, *Kumho Tire Co.* v. *Carmichael*, 119 S. Ct. 1167, 1173-74 (1999).

The decision below conflicts in several ways with the decisions of other courts of appeals interpreting and applying *Lopez*. *First*, the core holding of the decision below is that a statute exceeds the commerce power of Congress if it "neither regulates an economic activity nor contains a jurisdictional element." App. at 23a-24a. The Fourth Circuit adopted a *per se* rule that Congress lacks the power under the Commerce Clause to regulate intrastate non-economic activity no matter how substantial the real-world negative impact of that activity on the national economy and interstate commerce. *Id.* at 27a-29a, 39a-40a, 48a-51a. That conclusion conflicts with decisions of seven other courts of appeals.

For example, in *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996), the court held that the Eagle Protection Act, which criminalized the intrastate possession of eagle feathers, fell within Congress' power under the Commerce Clause. *Id.* at 1480-82. *Bramble* explicitly rejected the argument that Congress had exceeded its commerce power because the "simple possession" of eagle feathers "has nothing to do with commerce or any economic enterprise." *Id.* at 1480-81. Rather, the court sustained the statute because Congress "had a rational basis on which to conclude" that this intrastate non-economic activity would have a substantial effect on interstate commerce by "preserv[ing] the possibilities" of future commerce in the species, travel to study the species, and medical research. *Id.* at 1481-82 (quotations omitted). Using similar reasoning, the court in *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998), upheld the portion of the Endangered Species Act that made it unlawful to possess certain endangered species, including those that exist only on an intrastate basis. *Id.* at 1049-52.[12] The court specifically held that "a statute need not regulate economic activity directly." *Id.* at 1049. Instead, the court concluded that "the proper test of whether an activity can be regulated under the Commerce Clause is not whether the activity itself is commercial or economic but rather whether the activity has a *substantial effect* on interstate commerce." *Id.* at 1050 (emphasis added).

[12] The concurring opinion of Judge Henderson, was "substantially similar" in its analysis and application of *Lopez*. *National Ass'n of Home Builders*, 130 F. 3d at 1046 n.3 (Wald, J.). Judge Henderson's concurrence also held that *Lopez* permitted the statute to reach possession of "entirely intrastate creatures" because of "a substantial effect on our ecosystem and likewise on interstate commerce." *Id.* at 1058. (Henderson, J., concurring) (emphasis and footnote omitted).

In addition, the courts of appeals uniformly have upheld the Freedom of Access to Clinics Entrance Act (FACE) against arguments that the activity of obstructing access to abortion clinics was a non-economic activity that the commerce power could not reach under *Lopez*. As the Seventh Circuit held, "we find no support for reading *Lopez* as permitting only regulation of economic activities exclusive of regulations that reach or affect economic activities. . . . [T]his Court will not read such a dramatic change into the law by selectively relying on Supreme Court statements plucked from their context." *United States* v. *Wilson*, 73 F.3d 675, 685 (7th Cir. 1995). Numerous other courts of appeals are in accord. See, *e.g.*, *Terry*, 101 F.3d at 1417 ("The regulated activity -- in this case, interfering with abortion clinics -- need not be commercial, so long as its effect on interstate commerce is substantial."); *United States* v. *Weslin*, 156 F.3d 292, 296 (2d Cir. 1998) (per curiam), *cert. denied*, 119 S. Ct. 804 (1999); *United States* v. *Bird*, 124 F.3d 667, 675-76 (5th Cir. 1997) ("there can be no question that Congress is able to regulate noncommercial, intrastate activity that substantially affects interstate commerce"); *United States* v. *Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996); *Cheffer* v. *Reno*, 55 F.3d 1517, 1520 n.6 (11th Cir. 1995).[13]

The Fourth Circuit's *per se* rule against regulating non-economic activity under the Commerce Clause has also been rejected by courts of appeals in other contexts. See, *e.g.*, *United States* v. *Olin Corp.*, 107 F.3d 1506, 1510, 1511 (11th Cir. 1997) (rejecting argument that CERCLA must regulate economic activity directly to satisfy the Commerce Clause and holding that Commerce Clause authority is based on the effect on commerce "whatever [the] nature" of the regulated activity);

[13] FACE has also been upheld on the alternative ground that it "does regulate commercial activity, the provision of reproductive health services." *Cheffer*, 55 F.3d at 1520; *accord*, *e.g.*, *Dinwiddie*, 76 F.3d at 921.

United States v. *Parker*, 108 F.3d 28, 30 (3d Cir.) (Child Support Recovery Act case noting that Third Circuit had rejected the argument that "*Lopez* created a bright line rule establishing that unless an activity is commercial or economic it is beyond the reach of Congress under the Commerce Clause"), *cert. denied*, 118 S. Ct. 111 (1997); see also *United States* v. *Viscome*, 144 F.3d 1365, 1369 n.9 (11th Cir.) ("*Lopez* holds simply that Congress may regulate non-economic activity if Congress has a rational basis to determine that the proscribed activity (here, arson) substantially affects interstate or foreign commerce."), *cert. denied*, 119 S. Ct. 362 (1998).

Second, the decision below adopted a *per se* rule that intrastate conduct that has an "indirect" effect on interstate commerce cannot substantially affect interstate commerce. App. at 51a, 69a-70a, 83a. Thus, although the decision below gave lip service to the "rational basis" test for reviewing Congressional findings supporting Commerce Clause authority, *id.* at 83a-84a, and conceded that the record before Congress permitted an inference that gender-based violence affects interstate commerce, *id.* at 66a-67a, the court of appeals nonetheless nullified any deference to Congressional findings by substituting its own finding that any effect on interstate commerce was too "indirect." *Id.* at 57a, 64a-68a. Every court of appeals since *Lopez* to address the issue other than the Fourth Circuit has continued to reject the direct/indirect distinction. See, *e.g.*, *Wilson*, 73 F.3d at 681, 685; *National Ass'n of Home Builders*, 130 F.3d at 1049; *id.* at 1059-60 & n.6 (Henderson, J., concurring); *Bramble*, 103 F.3d at 1481-82.

Third, the decision below defines what constitutes "areas of traditional state concern" upon which the exercise of the federal commerce power may not intrude in an unprecedentedly sweeping manner. The decision below holds

that the VAWA civil remedy intrudes upon areas of traditional state concern because it concluded that any subject that is or could be addressed by tort law or criminal law is an area of traditional state concern, even though the specific topic of gender-based violence has concededly been largely neglected by the states. App. at 73a-76a. The decision below directly contradicts rulings of other courts of appeals that have rejected treating the entire fields of tort and criminal law as areas of exclusive or traditional state concern, and thus have upheld federal statutes that address narrower sub-topics within the general fields of tort and crime because those sub-topics have been inadequately remedied by the states. See, *e.g.*, *United States* v. *Kirk*, 105 F.3d 997, 1003-04 (5th Cir.) (area of traditional state concern in *Lopez* was "public education," not crime generally), *cert. denied*, 118 S. Ct. 47 (1997); *United States* v. *McHenry*, 97 F.3d 125, 128 (6th Cir. 1996) ("Congress specifically found that local and state law enforcement efforts had proved inadequate in capturing auto thieves"), *cert. denied*, 519 U.S. 1131 (1997); *United States* v. *Bishop*, 66 F.3d 569, 584-85 (3d Cir. 1995) ("not every federal foray into criminal law is invalid"; car jacking was a specific national problem that warranted national attention). The Fourth Circuit's overly broad characterization of exclusive state concerns would encompass many areas in which Congress has a confirmed concurrent jurisdiction with the states under the commerce power, including securities regulation, environmental laws, and antitrust law.[14]

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[14] A further conflict arises from the fact that the decision below invalidated the entirety of the civil remedy of VAWA on its face, App. at 16a, 21a-22a, 31a, 51a, 166a, even though the court suggested that the commerce power would sustain a private remedy against gender-based violence in at least the contexts of employment and economically-motivated acts. *Id* at 25a-27a. The rape forced Brzonkala to terminate her education at Virginia Tech, for which she had paid tuition, room and board and other fees. Complaint ¶¶ 76-77. Clearly, paying substantial fees for a college education "is a quintessential

III. THE DECISION BELOW IS INCONSISTENT WITH *LOPEZ* AND EARLIER DECISIONS OF THIS COURT.

A. The Fourth Circuit Misread *Lopez*.

In *Lopez*, this Court found that the GFSZA exceeded Congress' power under the Commerce Clause, but nonetheless reaffirmed the important breadth of the Commerce Clause power as enunciated in the previous half century of Commerce Clause jurisprudence. *United States* v. *Lopez*, 514 U.S. 549, 555-58, 567 (1995). As amplified by Justice Kennedy's concurrence, joined by Justice O'Connor, the Court's prior Commerce Clause precedents were "not called into question" by *Lopez*'s "limited" holding. *Id.* at 568, 574 (Kennedy, J., concurring).

The decision below misread *Lopez* on at least three important points, and consequently misapplied *Lopez* to a statute that is fundamentally different than the GFSZA. *First*, contrary to the decision below, *Lopez* eschewed any bright-line test of constitutionality, noting that "[t]hese are not precise formulations, and in the nature of things they cannot be." *Id.* at

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commercial transaction." *United States* v. *Brown Univ.*, 5 F.3d 658, 666 (3rd Cir. 1993); *accord United States* v. *Sherlin*, 67 F.3d 1208, 1213 (6th Cir. 1995). The Fourth Circuit's approach cannot be reconciled with the holding of the Second Circuit that a facial challenge invoking *Lopez* fails unless "no set of circumstances exists under which the [Act] would be valid." *United States* v. *Sage*, 92 F.3d 101, 106 (2d Cir. 1996) (alteration in original) (quotations omitted), *cert. denied*, 519 U.S. 1099 (1997); *accord United States* v. *Mussari*, 95 F.3d 787, 791 (9th Cir. 1996), *cert. denied*, 520 U.S. 1203 (1997). Nor can it be reconciled with decisions treating and rejecting *Lopez*-based challenges on an as-applied basis. *See, e.g., National Ass'n of Home Builders*, 130 F.3d at 1052 n.10; *Bird*, 124 F.3d at 682; *Dinwiddie*, 76 F.3d at 919.

567. See also *id.* at 579 (Kennedy, J., concurring) (interpretation of the Commerce Clause is "not susceptible to the mechanical application of bright and clear lines"). The Court was accordingly careful to distance itself from earlier, formalistic tests of the commerce power that had proved unworkable and insensitive to the changing economic realities of the nation. *Id.* at 556; *id.* at 573-74 (Kennedy, J., concurring) (discussing "imprecision of content-based boundaries" and rejecting narrow "18th-century" understanding of commerce). Rather, this Court has sustained legislation under the Commerce Clause "on broad principles of economic practicality." *Id.* at 571 (Kennedy, J., concurring); see also *id.* at 572-73 (Kennedy, J., concurring) (reaffirming "the Court's definitive commitment to the practical conception of the commerce power").

Contrary to the decision below, the traditional commerce power test reaffirmed in *Lopez* does *not* limit the scope of that power to regulating intrastate activities that are themselves "economic." App. at 78a. *Lopez* restates the traditional test that "Congress' commerce authority includes the power to regulate those activities that [substantially affect] interstate commerce." *Lopez*, 514 U.S. at 558-59. Under this test, the scope of the commerce power stems not from the kind of conduct being regulated, but rather from whether the conduct of whatever kind has a substantial effect on interstate commerce. See, e.g., *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942) ("It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power.").

Second, the decision below failed to give the deference required by *Lopez* to rational Congressional findings that certain activities substantially affect interstate commerce. *Lopez*

reaffirmed that the test is "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." 514 U.S. at 557 (citing *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-280 (1981)). While specific findings are not necessary, if they are made, they can help courts evaluate Congress' judgment about the regulated activity's economic effect, "even though no substantial effect was visible to the naked eye." *Lopez*, 514 U.S. at 562-63. As Justice Kennedy explained, "[w]hatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance," *id.* at 577 (Kennedy, J., concurring), and that "[t]he substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt" than in other areas of constitutional interpretation. *Id.* at 579 (Kennedy, J., concurring). Simply put, courts should be less likely to find that Congress has abused its "substantial discretion" when Congress has carefully made findings.

Contrary to *Lopez*, the decision below failed to give Congress' findings the requisite deference even though it conceded that the "legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy" and that "[t]he record also supports an inference that some portion of this violence, and the toll that it exacts, is attributable to gender animus." App. at 68a. The court of appeals revived the formalistic distinction between direct and indirect effects as a rationale for refusing to defer to Congress' findings. Yet, as *Lopez* noted, in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), this Court firmly abandoned the formalistic distinction between direct and indirect effects with the ruling that the scope of Congress' Commerce Clause power "'is necessarily one of degree.'" *Lopez*, 514 U.S. at 555 (quoting *Jones & Laughlin Steel Corp.*,

301 U.S. at 37). See also *id.* at 572-73 (Kennedy, J., concurring) (describing the "abandoned abstract" direct and indirect effects test and explaining that "[t]he deference given to Congress has since been confirmed"). This direct/indirect distinction had proved unworkable, fostered judicial activism, and unduly restricted Congress' power to address the changing character of our national economy. See *id.* at 556; *id.* at 570-73 (Kennedy, J., concurring).

Third, the decision below defined what constitutes an "area of traditional state concern" in an unjustifiably sweeping manner required neither by *Lopez* nor by any other decision of this Court. *Lopez* recognized the importance of protecting areas of "traditional state concern" in commerce power analysis in order to protect federalism. *Id.* at 554, 557; *id.* at 574-80 (Kennedy, J., concurring). *Lopez* involved an area of traditional state concern: primary and secondary education. See *id.* at 580-83 (Kennedy, J. concurring). As Justice Kennedy emphasized, under the GFSZA, school officials would "find their own programs for the prohibition of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule." *Id.* at 583 (Kennedy, J., concurring). In contrast, nothing about the VAWA civil remedy imperils any program administered by state or local officials, much less any program to remedy gender-based violence. Moreover, by rejecting civil rights as an area of traditional federal concern, the decision below conflicts with this Court's ratification of civil rights as an area of proper federal legislative concern since Reconstruction.

B. The Decision Below Misconstrued *Lopez* And Prior Decisions Of This Court By Ignoring Key Differences Between The GFSZA And VAWA's Civil Remedy.

Because the decision below seriously misread *Lopez*, it failed to appreciate at least three significant differences between the GFSZA and the VAWA civil remedy. Consequently it improperly held that upholding the VAWA civil remedy would obliterate any limitations on the commerce power. App. at 70a.

First, unlike *Lopez*, where there were no Congressional findings, here Congress' detailed factual assessments supporting the VAWA civil remedy arise out of extensive hearings and were confirmed in committee reports. As set forth above, those findings enumerated the specific ways that the nationwide problem of gender-based violence prevents women's full participation in the national economy. See *supra* at 4-6.

Second, unlike the GFSZA, the VAWA civil remedy is not a criminal statute, and gender-based violence has not been a traditional area of state concern. To the contrary, as the majority below acknowledged, the states often have been unable or unwilling to provide effective civil and criminal remedies for victims of gender-based violence. See App. at 44a; see also App. at 232a (Motz, J., dissenting) (citing legislative record of state supreme court task force reports concluding that crimes against women were not adequately dealt with in state criminal justice systems due to bias and discrimination); App. at 276a-277a (Motz, J., dissenting) (citing legislative record of 41 state Attorneys Generals urging adoption of the VAWA because state criminal and tort remedies were insufficient to address pervasive problems caused by violence against women). Moreover, because the VAWA civil remedy concerns civil rights, it falls within an area squarely within the federal

legislative power, unlike primary or secondary education or criminal law, which fall within the purview of traditional state legislative control.

Third, unlike the GFSZA, the civil remedy of VAWA is anti-discrimination legislation that seeks to remove documented intrastate barriers to the participation of a specific group of persons in interstate commerce and the national economy, a goal of Commerce Clause legislation this Court has endorsed. See *Lopez*, 514 U.S. at 557 (citing with approval *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964)).[15] This power exists even when those private citizens creating the barriers, like Ms. Brzonkala's attackers, were motivated by discrimination rather than profit. See, *e.g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 243-44, 260 (1964); cf. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 583-84 (1997) (Commerce Clause applies regardless of whether regulated activity was profit driven).

The decision below conflicts with this Court's holdings by rejecting Congress' authority to enact civil rights legislation to remove discriminatory barriers to economic participation. In both *Heart of Atlanta* and *McClung*, this Court upheld Congress' Commerce Clause power to enact anti-discrimination laws like VAWA's civil remedy based on a similar legislative record. For example, in *Heart of Atlanta*, this Court upheld Congress' prohibition of racial discrimination at a local motel,

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[15] Earlier decisions also had confirmed Congress' power to remove intrastate barriers to the participation of goods and other things in interstate commerce. *See, e.g.*, *Wickard* v. *Filburn*, 317 U.S. 111, 128-29 (1942); *United States* v. *Wrightwood Diary Co.*, 315 U.S. 110, 119 (1942); *Mulford* v. *Smith*, 307 U.S. 38, 47-48 (1939).

deferring to Congressional findings that racial discrimination in accommodations was a "nationwide" problem that disrupted and obstructed commerce, and holding that Congress could eliminate the "obstructions and restraints" that discrimination poses to commercial participation under the Commerce Clause. 379 U.S. at 252, 253, 261; see also *id.* at 275-76 (Black, J., concurring). The Court further ratified Congress' effort to right the "moral wrongs" by use of Commerce Clause legislation in light of the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." *Id.* at 257.

Similarly, in *Katzenbach* v. *McClung*, this Court upheld Congress' prohibition of racial discrimination at a local restaurant, relying on Congressional findings, analogous to those underlying VAWA, that discrimination in restaurants served as a barrier to the participation in commerce by African-Americans. 379 U.S. 294, 300 (1964) ("[discriminatory practices] obviously discourage[d] travel and obstruct[ed] interstate commerce for one can hardly travel without eating," and they "deterred professional, as well as skilled, people from moving into areas where such practices occurred"). The Court held that Congress had power to reach intrastate discriminatory activities "which directly *or indirectly* burden or obstruct interstate commerce." *Id.* at 302 (emphasis added); see also *id.* at 304 (applying "rational basis" test).[16]

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[16] This Court similarly held that Congress acted within its Commerce Clause power when it criminalized intrastate "loan-sharking," in part because the "loan shark racket" exploited poor people, thereby obstructing participation in interstate commerce. *Perez* v. *United States*, 402 U.S. 146, 155-56 (1971). Since *Lopez*, courts of appeals have continued to recognize that the commerce power may be used to remove intrastate impediments to persons participating in interstate commerce. *See, e.g., United States* v. *Soderna*, 82 F.3d 1370, 1374-75 (7th Cir. 1996) (Posner, J.) (upholding FACE). *See also National Organization For Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260 (1994) (RICO,

The decision below departs from these holdings by refusing to defer to Congress' analogous efforts in enacting VAWA's civil remedy. As in *Heart of Atlanta* and *McClung*, Congress recognized that pervasive, discriminatory conduct that the states have been unable to remedy can systematically limit the participation of an identifiable group of persons in the national economy and in interstate commerce. As Congress found, gender-motivated violence has impeded women's mobility (including interstate mobility), limited their economic choices, kept them out of jobs, and decreased their economic opportunities in many ways. In addition, states still retain entrenched biases against women. Because of this prejudice, states in some cases have sanctioned, and in other cases have neglected fully to redress, gender-based violence. See *supra* at 5-7. Christy Brzonkala's experience is illustrative of these barriers: discriminatory violence forced her to leave Virginia Tech, an institution to which she had been paying tuition, room and board and fees, and from which she had expected to receive a degree, preparing her for the workplace. As Congress recognized, the damage done by discriminatory violence to this young woman's economic activities and prospects is typical of experiences shared by too many American women. Under a "practical conception of the commerce power," *Lopez*, 514 U.S. at 573 (Kennedy, J., concurring), Congress should be able to remove that discriminatory barrier, just as it removed the barrier of racial discrimination through other anti-discrimination laws.

The VAWA civil remedy, like the civil rights statutes in *Heart of Atlanta* and *McClung*, is decidedly different from the GFSZA, which was not an anti-discrimination statute. Unlike racial and gender discrimination, which are barriers to full

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a statute enacted under the Commerce Clause, applies to violence that deters women from obtaining abortion services, even though the violence "may not benefit the protesters financially").

participation in commerce, primary and secondary school education is a foundation for fostering that participation to which the states successfully devote extraordinary time, money, and effort. See *Lopez*, 514 U.S. at 580-83 (Kennedy, J., concurring). Thus, the GFSZA was not removing a long-standing discriminatory barrier to participation in the national economy and interstate commerce that the states had been unable to remedy; rather, Congress substituted its judgment for that of the states on how best to build the educational foundation for participation in commerce. See *id.* (Kennedy, J., concurring).

The distinctions between the VAWA civil remedy and the GFSZA make plain that the Fourth Circuit erred. At a minimum, the court's failure to appreciate these distinctions -- and the basis that they provide for limiting the scope of the commerce clause consistent with *Lopez* -- warrants this Court's review.

IV. THE COURT ALSO SHOULD GRANT THE PETITION BECAUSE THE DECISION BELOW CONFLICTS WITH *CITY OF BOERNE* V. *FLORES*.

The court of appeals decision misapprehends this Court's most recent articulation of Congress' authority under Section 5 of the Fourteenth Amendment ("Section 5"), and the role of federal courts in evaluating the limits of that authority.[17]

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[17] In rejecting Congress' authority to enact VAWA's civil remedy under Section 5, the decision below conflicts with the two other courts that have addressed the issue, each of which held that the law fell squarely within Congress' Section 5 powers. *See Wright* v. *Wright*, No. Civ-98-572-A, slip op. at 5-7 (W.D. Okla. Apr. 27, 1999); *Timm* v. *DeLong*, No. 8:98CV43, slip op. at 29-36 (D. Neb. June 22, 1998).

This Court recently has reaffirmed Congress' "wide latitude" to exercise its Section 5 power to enact laws necessary to "remedy or prevent" discriminatory conduct before constitutional violations occur. *City of Boerne* v. *Flores*, 521 U.S. 507, 519-20 (1997); *accord Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, No. 98-531, 1999 WL 412723, at *7 (U.S. June 23, 1999). While this power is "not unlimited," and does not permit Congress to define the substance of Fourteenth Amendment violations, this Court has confirmed that Section 5 laws can regulate conduct that itself is not unconstitutional in order to prevent unconstitutional conduct from occurring. *Florida Prepaid*, 1999 WL 412723, at *7-*8; *Lopez* v. *Monterey County*, 119 S. Ct. 693, 703 (1999) (citing *Boerne*, 521 U.S. at 518); *accord Katzenbach* v. *Morgan*, 384 U.S. 641, 648 (1966).

By contrast, the court below limited Section 5 laws to those that provide redress against states or state actors. App. at 100a, 104a.[18] That conclusion conflicts with this Court's rulings that the state's involvement need be neither exclusive nor direct to warrant Congress' exercise of its Section 5

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[18] By so limiting Congress' Section 5 powers, the decision below also is in tension with the rulings of other circuit courts of appeals, which squarely uphold Congress' authority to regulate conduct that itself is not unconstitutional. *See, e.g., Anderson* v. *State Univ.*, 169 F.3d 117, 121 (2d Cir. 1999), *petition for cert. filed*, 67 USLW 3717 (U.S. May 17, 1999) (No. 98-1845); *Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426, 1437-38 (11th Cir. 1998) (Hatchett, C.J., concurring in part), *cert. granted*, 119 S. Ct. 901 (1999); *Coger* v. *Board of Regents*, 154 F.3d 296, 307 (6th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3364 (U.S. Nov. 16, 1998) (No. 98-821); *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 715-16 (7th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3469 (U.S. Jan. 11, 1999) (No. 98-1117); *Scott* v. *University of Miss.*, 148 F.3d 493, 501 (5th Cir. 1998); *Goshtasby* v. *Board of Trustees*, 141 F.3d 761, 772 (7th Cir. 1998); *Oregon Short Line R.R. Co.* v. *Department of Revenue*, 139 F.3d 1259, 1266 (9th Cir. 1998); *Coolbaugh* v. *Louisiana*, 136 F.3d 430, 434-35 (5th Cir.), *cert. denied*, 119 S. Ct. 58 (1998).

powers. *United States* v. *Guest*, 383 U.S. 745, 755 (1966). The states' discriminatory failure adequately to address gender-based violence detailed by Congress certainly is tantamount to the state involvement contemplated by this Court in *Guest*.[19]

The court of appeals conceded that the VAWA civil remedy's legislative history "does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims of gender-motivated violence from obtaining vindication through the criminal or civil systems." App. at 153a. But it contradicted *Boerne* by refusing to take the next logical step, which would acknowledge that Congress, consistent with *Boerne*, enacted VAWA's civil remedy to provide a federal forum for gender-based violence claims in order to prevent the equal protection violations that result from the states' failings.[20]

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[19] Congress reviewed evidence of those barriers to justice, including legal doctrines of interspousal immunities and marital rape exemptions and state judicial bias task force reports documenting the biases that prevent women from obtaining equal protection of the laws, before it enacted VAWA's civil remedy. *See* notes 4, 5 and 7, *supra*.

[20] In addition, the VAWA civil remedy enforces the privileges or immunities clause of the Fourteenth Amendment which protects, *inter alia*, the right to travel and the right of free access to the courts of justice of the several states. *See Saenz* v. *Roe*, 119 S. Ct. 1518, 1526 (1999); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867); *see also 1993 H. Hearing* at 38, 47-49 (testimony of Burt Neuborne, Professor of Law, New York University, supporting Congress' power to enact the VAWA civil remedy under the privileges or immunities clause).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Martha F. Davis*
Julie Goldscheid
NOW LEGAL DEFENSE
AND EDUCATION FUND
395 Hudson Street, 5th floor
New York, New York 10014
(212) 925-6635

Eileen N. Wagner
4906 Fitzhugh Avenue
Suite 201
Richmond, Virginia 23230
(804) 359-1169

Carter G. Phillips
Richard D. Bernstein
Katherine Adams
Faith E. Gay
Paul A. Hemmersbaugh
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* *Counsel of Record*

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